by reason of any defect or insufficiency, due to its negligence, in its property or equipment. April 22, 1908, 35 Stat. 65. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury the statute expressly provides that it "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." See *Second Employers' Liability Cases*, 223 U. S. 1, 49, 50; *Seaboard Air Line* v. *Tilghman*, 237 U. S. 499, 501. We think that the argument for the plaintiff in error overlooks the inferences of fact which the jury was entitled to draw. Thus, the jury could properly regard the two brakemen as assisting each other in the movement in question. Such assistance was certainly appropriate, if not absolutely necessary. The very purpose of having two brakemen was not to put upon either the entire responsibility. Working together under the exigencies of such operations, particularly when conducted in the night time, it was manifestly contemplated that the one brakeman would supplement the other and not be compelled at the peril of his rights personally to examine what the other did or the basis of the reports the other gave. Each had a reasonable latitude in relying upon the statements of the other made in the course of the operation and as a part of it. The Supreme Court of the State said: "It was

a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto." In this we find no error. When the engine was uncoupled, Skaggs was on the right-hand side, while Buchta was on the other side,—the side of the passing track—a better place to judge the clearance. The fact that Skaggs asked his questions is itself not without significance. These questions indicated doubt on Skaggs' part, while Buchta's reply showed certainty on his. It was plainly permissible to infer from the testimony that the two men were not in positions of equal advantage, and Skaggs was entitled to the exercise of reasonable care on the part of Buchta in observing and reporting the position of the cars. As there was evidence upon which it could be found that Buchta was negligent, and that thereby injury resulted to Skaggs, it cannot be said that the recovery in this aspect of the case was contrary to the statute.

But it is urged that the trial court erred in its instructions to the jury. After stating that if any employee "was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant . . . would be liable for that negligence," and after referring to the "direct conflict of testimony" with respect to what was said and done by Buchta, the trial court charged as follows: "Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company. You must determine this question of fact from all of

the testimony in the case." It was added, in substance, that if Buchta did not fail to exercise reasonable care the plaintiff was not entitled to recover. It is contended that the trial court erred in failing to qualify the instruction quoted, and other statements to the same effect, by reference to what Skaggs himself did, knew, or was in a position to know. But in view of the state of the testimony, and the point to which the court's instruction was addressed, we cannot say that it was in itself erroneous. If the plaintiff in error desired any addition, amplification or qualification in order to present its point of view to the jury it should have made appropriate request therefor. The record does not show that the plaintiff in error either objected at the time to any statement made by the court to the jury or that it made any request whatever for instructions. While under the local statute (General Statutes, Minnesota, § 7830), the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the trial court, we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called. *State* v. *Zempel*, 103 Minnesota, 428, 429; *Waligora* v. *St. Paul Foundry Co.*, 107 Minnesota, 554, 559; *Sassen* v. *Haegle*, 125 Minnesota, 441; *State* v. *Sailor*, 153 N. W. Rep. (Minn.) 271; *Smith* v. *Great Northern Ry. Co.*, 153 N. W. Rep. (Minn.) 513. This, also, is a sufficient answer to the complaint of the failure of the trial court to charge the jury with respect to assumption of risk. There was no request for any instruction upon this point. So far as these criticisms are concerned, we are unable to say that any asserted Federal right was denied by the state court.

The remaining question is with respect to the instructions of the trial court on the subject of contributory negligence. In the course of these the court fell into the error of saying that, if Skaggs was negligent, "a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you" (the jury); and, again, that the jury should "take into consideration his negligence in comparison with the negligence of the defendant." But the court read t' applicable provision of the statute to the jury and also said: "The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame." And no request was made for a correction of the first-mentioned parts of the charge. It was recognized by the Supreme Court of the State that those parts failed to conform to the correct interpretation of the statutory rule as defined in *Norfolk & Western Rwy.* v. *Earnest*, 229 U. S. 114, 122, and the court quoted what we there said, as follows: "But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as com-

pared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. . . . Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant."

The state court concluded that 'upon the whole instruction no prejudice to defendant resulted.' And in this view we concur.

Judgment affirmed.

FRANK CROCKER, TRUSTEE IN BANKRUPTCY